



DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning

Certain Insufflation Tubing

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that U.S. Customs and Border Protection (“CBP”) has issued a final determination concerning the country of origin of certain insufflation tubing. Based upon the facts presented, CBP has concluded that the country of origin of the insufflation tubing in question is China, for purposes of U.S. Government procurement.

DATES: The final determination was issued on July 13, 2018. A copy of the final determination is attached. Any party-at-interest, as defined in 19 C.F.R. § 177.22(d), may seek judicial review of this final determination within [insert 30 days from date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Yuliya A. Gulis, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at (202) 325-0042.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on July 13, 2018, pursuant to subpart B of Part 177, U.S. Customs and Border Protection Regulations (19 C.F.R. Part 177, subpart B), CBP issued a final determination concerning the country of origin of certain insufflation tubing imported by Global Resources International, Inc. from the Dominican Republic, which may be offered to the U.S. Government under an undesignated government procurement contract. This final determination, HQ H298148, was issued under procedures set forth at 19 C.F.R. Part 177, subpart B, which implements Title III of the Trade Agreements Act

of 1979, as amended (19 U.S.C. §§ 2511-18). In the final determination, CBP concluded that the country of origin of the insufflation tubing is China for purposes of U.S. Government procurement.

Section 177.29, CBP Regulations (19 C.F.R. § 177.29), provides that a notice of final determination shall be published in the **Federal Register** within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 C.F.R. § 177.30), provides that any party-at-interest, as defined in 19 C.F.R. § 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the **Federal Register**.

Dated: July 13, 2018.

Alice A. Kipel,
Executive Director,
Regulations and Rulings,
Office of Trade.

HQ H298148

July 13, 2018

OT:RR:CTF:VS H298148 YAG

CATEGORY: Origin

Ms. Christi Roos, LCB
M-PACT Solutions
P.O. Box 30209
4294 Swinnea Road
Memphis, TN 38118

RE: U.S. Government Procurement; Country of Origin of Insufflation Tubing; Title III, Trade Agreements Act of 1979 (19 U.S.C. § 2511 *et seq.*); Subpart B, Part 177, CBP Regulations

Dear Ms. Roos:

This is in response to your correspondence dated March 26, 2018, requesting a final determination, on behalf of Global Resources International, Inc. (“Global Resources”), concerning the country of origin of certain insufflation tubing, pursuant to subpart B of Part 177 of the U.S. Customs and Border Protection (“CBP”) Regulations (19 C.F.R. § 177.21 *et seq.*).

We note that Global Resources is a party-at-interest within the meaning of 19 C.F.R. § 177.22(d)(1) and is entitled to request this final determination.

FACTS:

Global Resources is the importer of insufflation tubing. Insufflation tubing is used to interconnect and deliver carbon dioxide gas (“CO₂”) from the insufflator machine (CO₂ “gas pump” or insufflator) to the patient during laparoscopic surgery. Insufflation tubing is typically 3 meters (around 10 feet) in length, composed of a long clear plastic tubing and a short blue plastic tubing, with a filter attached about 30 centimeters (12 inches) from one end. The purpose of the filter is to prevent fluid backflow into the insufflator and to help prevent contaminants from entering the patient’s abdominal cavity. One end of the tubing is comprised of a male Luer lock fitting, which always connects to an instrument that is inserted into the patient’s abdomen. The other end connects to the insufflator, which may contain any number of types of fittings.

The country of origin of the clear tubing, blue tubing, filter assembly, and fittings is China. The insufflation tubing is assembled, sterilized, packed, and labeled in the Dominican Republic.

ISSUE:

What is the country of origin of the insufflation tubing for purposes of U.S. Government procurement?

LAW AND ANALYSIS:

CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain “Buy American” restrictions in U.S. law or practice for products offered for sale to the U.S. Government, pursuant to subpart B of Part 177, 19 C.F.R. § 177.21 *et seq.*, which implements Title III of the Trade Agreements Act of 1979 (“TAA”), as amended (19 U.S.C. § 2511 *et seq.*).

Under the rule of origin set forth under 19 U.S.C. § 2518(4)(B):

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

See also 19 C.F.R. § 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of Part 177 consistent with the Federal Procurement Regulations. *See* 19 C.F.R. § 177.21. In this regard, CBP recognizes that the Federal Acquisition Regulations restrict the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. The regulations define a "designated country end product" as:

WTO GPA [World Trade Organization Government Procurement Agreement] country end product, an FTA [Free Trade Agreement] country end product, a least developed country end product, or a Caribbean Basin country end product.

A "WTO GPA country end product" is defined as an article that:

- (1) Is wholly the growth, product, or manufacture of a WTO GPA country; or
- (2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

See 48 C.F.R. § 25.003.

The Dominican Republic is a WTO GPA country. China is not. You assert that the insufflation tubing at issue is a product of the Dominican Republic for U.S. Government procurement purposes because all of the components of insufflation tubing, sourced from China, meet the requisite tariff shift rules under the Dominican Republic-Central America-United States Free Trade Agreement ("DR-CAFTA"). Please note that this is an incorrect analysis to apply to determine the country of origin for U.S. Government procurement purposes. Rather, as set forth below, the relevant test is "substantial transformation."

In the Court of International Trade's decision in *Energizer Battery, Inc. v. United States*, 190 F. Supp. 3d 1308 (2016), the court interpreted the meaning of substantial transformation as used in the Trade Agreements Act of 1979 for purposes of government procurement. *Energizer* involved the determination of the country of origin of a flashlight, referred to as the Generation

II flashlight, under the TAA. Other than a white LED and a hydrogen getter, all of the components of the Generation II flashlight were of Chinese origin. The components were imported into the United States where they were assembled into the finished Generation II flashlight.

The court reviewed the “name, character and use” test in determining whether a substantial transformation had occurred, and reviewed various court decisions involving substantial transformation determinations. The court noted, citing *Uniroyal, Inc. v. United States*, 3 CIT 220, 226, 542 F. Supp. 1026, 1031, *aff’d*, 702 F.2d 1022 (Fed. Cir. 1983), that when “the post-importation processing consists of assembly, courts have been reluctant to find a change in character, particularly when the imported articles do not undergo a physical change.” *Energizer* at 1318. In addition, the court noted that “when the end-use was pre-determined at the time of importation, courts have generally not found a change in use.” *Energizer* at 1319, citing as an example, *National Hand Tool Corp. v. United States*, 16 CIT 308, 310, *aff’d* 989 F.2d 1201 (Fed. Cir. 1993). Furthermore, courts have considered the nature of the assembly, *i.e.*, whether it is a simple assembly or more complex, such that individual parts lose their separate identities and become integral parts of a new article.

In reaching its decision in *Energizer*, the court examined whether the imported components retained their names after they were assembled into the finished Generation II flashlights. The court found “[t]he constitutive components of the Generation II flashlight do not lose their individual names as a result [of] the post-importation assembly.” The court also found that the components had a pre-determined end-use as parts and components of a Generation II flashlight at the time of importation and did not undergo a change in use due to the post-importation assembly process. Finally, the court did not find the assembly process to be sufficiently complex as to constitute a substantial transformation. Thus, the court found that Energizer’s imported components did not undergo a change in name, character, or use as a result of the post-importation assembly of the components into a finished Generation II flashlight. The court determined that China, the source of all but two components, was the correct country of origin of the finished Generation II flashlights under the government procurement provisions of the TAA.

The assembly process of insufflation tubing is similar to that of the Generation II flashlight in *Energizer*. All of the components are sourced from China, and there is no evidence of a change in the shape or material composition of the components. *See also* Headquarters Ruling Letter (“HQ”) H035441, dated September 11, 2008; and HQ 734214, dated November 18, 1991. In other words, the individual components do not lose their separate identities as a result of the assembly process in the Dominican Republic and do not undergo a change in their pre-determined uses. Considering the totality of the information provided to CBP, and relying upon the court’s application of substantial transformation in *Energizer*, we find that the country of origin of the assembled insufflation tubing, produced as described herein, is China.

HOLDING:

Based on the facts provided, insufflation tubing will be considered a product of China for purposes of U.S. Government procurement.

Notice of this final determination will be given in the Federal Register, as required by 19 C.F.R. § 177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 177.31, that CBP reexamine the matter anew and issue a new final determination. Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days of publication of the Federal Register Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Alice A. Kipel, Executive Director
Regulations and Rulings
Office of Trade

[FR Doc. 2018-15536 Filed: 7/19/2018 8:45 am; Publication Date: 7/20/2018]